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No. 89-258

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

v.

AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 16 of the Clayton Act permits a non-federal plaintiff, who has neglected to seek a preliminary injunction blocking a proposed merger, nonetheless to obtain an injunction requiring divestiture or dissolution after the merger has been consummated.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

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* The following information is provided pursuant to Rule 28.1: Respondent Lucky Stores, Inc. is a wholly-owned subsidiary of Alpha Beta Co., which in turn is a wholly-owned subsidiary of Alpha Beta Stores, Inc., which in turn is a wholly-owned subsidiary of respondent American Stores Co. All of the subsidiaries of Lucky Stores, Inc. are wholly owned. Respondent Alpha Beta Acquisition Corp., which was formerly a wholly-owned subsidiary of Alpha Beta Co., was merged into respondent Lucky Stores, Inc. on June 9, 1989. Respondent American Stores Co. has no subsidiaries or affiliates other than wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

American Stores Co. ("American"), Alpha Beta Acquisition Corp. ("Alpha Beta"), and Lucky Stores, Inc. ("Lucky") hereby oppose the petition for a writ of certiorari filed by the State of California.

STATEMENT

1. American is a nationwide grocery retailer, which, prior to June 1988, owned and operated 252 "Alpha Beta" and "Skaggs Alpha Beta" retail grocery stores in

California. On March 21, 1988, American announced a $2.5 billion tender offer for the outstanding shares of another nationwide grocery chain—Lucky Stores—which at that time operated 340 "Lucky Stores" and "Lucky Food Basket" stores in California. American's purpose in acquiring Lucky was to bring its Alpha Beta stores under the Lucky banner and to obtain the substantial cost-saving efficiencies that integration of the two chains would provide. American estimated that this integration would produce shelf price reductions to consumers of $50 million annually.

Immediately after its announcement, American began supplying information to the Federal Trade Commission (FTC) under Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the FTC's Hart-Scott-Rodino Act ("HSR Act") regulations, 16 C.F.R. § 801 *et seq.* On May 31, 1988, after protracted negotiations with the FTC, American entered into a comprehensive consent order in which it agreed, among other things, to substantial divestitures (including 37 stores in California), disposal of its Midwest assets and a ten-year ban on future acquisitions. The FTC, for its part, agreed not to challenge the merger provided all of the conditions of the consent decree were satisfied. On June 9, 1988, American completed its purchase of all of Lucky's outstanding shares. The FTC gave final approval to the consent agreement on August 31, 1988, after review of public comments filed by the California Attorney General ("CAG") and others during a 60-day public comment period.

During this entire period, American also cooperated fully with the CAG, who had begun his own antitrust investigation. Among other things, American furnished the CAG all the California documents and information it had given to the FTC and kept the CAG fully informed of the status of the FTC proceedings. Despite several requests, the CAG declined to inform American of its enforcement intentions. Declaration of Stephen Axinn,

¶ 14 (ER 596).[1] However, nearly three months after American completed the FTC-approved merger by paying $2.5 billion to Lucky shareholders, and five and a half months after the beginning of the tender offer, the CAG commenced an antitrust action in the United States District Court for the Central District of California. The suit, which was brought under Section 16 of the Clayton Act (15 U.S.C. § 26), sought to require American to divest itself of its newly-acquired Lucky stores located in California.

2. After granting the CAG's motion for a temporary restraining order on September 7, 1988, the district court held a hearing (based entirely upon written testimony) to determine whether a preliminary injunction should issue. Respondents presented extensive evidence that their grocery retailers faced substantial competition from "mom and pop" retail grocery stores, convenience food stores, warehouse food stores and other grocery vendors in addition to other large supermarkets. Respondents also proposed as relevant geographic markets 14 individual Metropolitan Statistical Areas ("MSAs"), as defined by the Office of Management and Budget.[2] Based upon these product and geographic market definitions, respondents demonstrated that the combined American/Lucky grocery chains had a market share averaging approximately 19 percent in these 14 markets, *before* divestiture of the 37 stores respondents were required to sell under their agreement with the FTC. Second Declaration of Peter Max, Exhibit 5 (ER 114-28). Respondents also presented extensive evidence showing that entry into the grocery retailing business is easy and that such entry would occur

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[1] Citations to the Excerpts of Record filed in the court of appeals will be referred to throughout by the abbreviation "ER."

[2] These included Los Angeles, Santa Barbara, Anaheim, Bakersfield, Oxnard/Ventura, Riverside/San Bernardino, San Diego, Oakland, Monterey/Salina, San Francisco, San Jose, Santa Cruz, Santa Rosa, and Vallejo/Napa.

swiftly if any grocery chain attempted to raise its prices above competitive levels. Pet. App. A13-A14.

For purposes of its decision, the district court accepted respondents' definition of the relevant geographic markets. Pet. App. B11. However, it adopted the CAG's definition of the relevant product market, which included *only* large, full-line "supermarkets" that operated in more than 10,000 square feet of building space. *Id.* at B10. This definition was based solely upon the written testimony of two economists, one of whom had never reviewed any of the market-specific documents submitted to the CAG. Marion Declaration at 4 (ER 994). Even under this definition of the market, however, and prior to the divestiture required by the FTC, the market share of the combined American/Lucky chain was relatively small, averaging just 24 percent over the 14 geographic markets accepted by the court. *Id.* B12.

Nonetheless, and largely on the basis of the Justice Department's merger guidelines (which the FTC had presumably applied in *approving* the merger),[3] the district court held that the statistical evidence created a presumption that increased concentration created by the merger would substantially lessen competition. Pet. App. B12-B14. Concluding that respondents' evidence as to ease of entry was insufficient to rebut this presumption, the court held that the CAG had established a likelihood of prevailing on the merits. *Id.* at B17-B19. The court also concluded that, because the CAG had shown the possibility of an adverse effect on competition, the CAG had made an "adequate" showing of irreparable injury justifying preliminary injunctive relief. *Id.* at B22.[4]

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[3] The FTC uses the Justice Department guidelines in evaluating horizontal mergers subject to its jurisdiction. See 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, Special Supp., June 17, 1982, S-12 (FTC statement on Justice Department guidelines).

[4] The court made no finding, however, that petitioner would suffer irreparable harm in the absence of divestiture. Pet. App. B22.

Accordingly, the district court entered a preliminary injunction on September 29, 1988. Although Alpha Beta and Lucky already had merged, the court imposed affirmative relief in the form of an order requiring respondents to "take all steps necessary to operate" American and Alpha Beta "independently of the assets and businesses" of Lucky in the State of California. Pet. App. B25. In addition, the injunction required respondents to "refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988," and to "refrain from taking any further steps" to merge or integrate the business operations of Lucky and Alpha Beta. *Id.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A21. Emphasizing that its review of the district court's preliminary injunction order was limited to a determination whether the district court had abused its discretion, the court of appeals declined to disturb the district court's preliminary findings as to the likelihood of success and irreparable injury. *Id* at A7-A9. However, after discussing respondents' evidence as to the relevant product market, the court of appeals stated:

> Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion . . . . Indeed, after all evidence is presented at trial, the fact finder may come to a different view of the market. Pet. App. A10.

Similarly, the court of appeals stated that respondents had made "a compelling case for easy entry into the market." *Id.* at A13.

Although it declined to disturb the district court's preliminary factual findings, the court of appeals held that the district court had misapprehended both the law of divestiture and the law of corporate mergers, and for that reason had abused its discretion in entering so sweeping an injunction. The court reiterated its 14-year-old

rule that, unlike a suit brought by the United States under Section 15 of the Clayton Act (15 U.S.C. § 25), a suit brought by a non-federal plaintiff under Section 16 of the Clayton Act may not seek direct or indirect divestiture. Pet. App. A17-A18. This rule, which is firmly grounded in the language, structure and legislative history of the Clayton Act, was established by the Ninth Circuit in *IT&T Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (*IT&T*), and has been followed by that court ever since. See *Bosse* v. *Crowell Collier & MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977) (*Bosse*); *Calnetics Corp.* v. *Volkswagen of America*, 532 F.2d 674, 692 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976) (*Calnetics*). In applying the rule to this case, the court reasoned that because, under Delaware law, the merger had already been consummated prior to the issuance of the injunction, the injunction constituted an improper divestiture order:

> The preliminary injunction in this case prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors. In other words, these stores must operate as if Lucky had never been acquired by American Stores at all. Such an injunction requires indirect divestiture. See *IT&T*, 518 F.2d at 924. Pet. App. A19.

The court then concluded that, inasmuch as the district court lacked authority to issue a permanent order requiring divestiture, it could not issue a preliminary injunction granting that relief. *Id.* at A20. The court also held, however, that petitioner could seek other, less drastic, injunctive relief on remand, and that the district court would be "free to consider granting such relief." *Id.*

Finally, the court of appeals rejected petitioner's argument that denying it the ability to obtain divestiture would make it difficult or impossible to obtain meaningful relief in merger cases. The court stated:

> We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice. Pet. App. A20-A21.[5]

ARGUMENT

The sole question presented by the petition is whether a district court has authority, in a suit by a non-federal plaintiff under Section 16 of the Clayton Act, to enter an injunction undoing an already-consummated merger or acquisition.[6] Even if this question were otherwise worthy of review by this Court (which it is not), this case, in its present interlocutory posture, is not an appropriate vehicle in which to address that issue. To respondents' knowledge, this Court has never granted review of an interlocutory order in circumstances in which (a) resolution of the issue presented in the petition would not dispose of the litigation no matter which party prevailed and (b) the issue could be raised by the losing party and decided by the Court after a final judgment has been entered. Inasmuch as this case will return to the district court for a trial on the merits regardless of the outcome in this Court, granting the petition at this stage of the litigation would be wholly unprecedented and wasteful of this Court's scarce resources.

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[5] Subsequently, the court of appeals unanimously denied rehearing, and rehearing en banc was denied without a single judge calling for a vote. Pet. App. C1. Justice O'Connor entered an order granting a stay on August 21, 1989, which was modified to require the CAG to post an adequate bond on August 22, 1989.

[6] The petition also lists a second question, which begins by asking "[w]hether the Court of Appeals erred by reversing [the] District Court's preliminary injunction." Pet. i. That question, however, is not separately addressed in the body of the petition. Moreover, to the extent that question differs from the first question ("Whether divestiture is a form of 'injunctive relief' under section 16 of the Clayton Act," *ibid.*), it is obviously too fact-bound to be worthy of the Court's attention.

Moreover, the question presented does not warrant review, both because it was decided correctly below and because it arises only in the rare circumstance in which (a) federal authorities determine that divestiture is unwarranted after reviewing the merger pursuant the Hart-Scott-Rodino Act's premerger notification procedures; *and* (b) a non-federal plaintiff neglects to challenge the merger or acquisition until after it is consummated. Thus, although the decision below appears inconsistent with one decision of the First Circuit, this disagreement—which has existed in dicta for more than a decade without any apparent adverse consequences to competition nationwide—is unquestionably "tolerable."

1. There is no doubt that the underlying merits of the petitioner's antitrust claims have not yet been adjudicated, and that, as the court of appeals observed, "no final judgment has been entered in this case." Pet. App. A21. All the district court has done so far is to enter a preliminary injunction designed to facilitate the entry of a permanent divestiture order *if* the district court ultimately concludes that (a) the merger at issue violates the Clayton Act, *and* (b) divestiture is the appropriate remedy. Pet. App. A10. The court of appeals, having held that divestiture is unavailable, has merely remanded the case for a redetermination of the appropriate preliminary relief and for a final disposition of the merits. Pet. App. A20. This case, therefore, will inevitably return to the district court for a trial on the merits regardless of this Court's disposition of the petition and, if this Court denies certiorari, petitioner will again be able to present the divestiture issue to this Court by way of a new petition if it prevails at trial. Thus, even if this Court were of the opinion that the issue presented in this case is worthy of review, the proper course, given the interlocutory posture of the case, would be to wait until after the district court has entered a final order on the merits before addressing that issue.

a. Because an issue decided in an interlocutory ruling can be raised again after a final order is entered, this Court has long held that interlocutory orders generally are not reviewable on certiorari. *E.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, *supra*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T.& K.W. R. Co.*, 148 U.S. 372, 384 (1893). The only exception to that rule is when resolution of the issue presented is "*necessary* to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Ibid.* (emphasis added); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986). This case fails to satisfy that standard for two independent reasons.

First, the unifying thread running through the few cases in which this Court has granted review of interlocutory orders is the principle that such action is appropriate only when the issue decided on review clearly could dispose of the litigation if decided in favor of one party. Thus, many of the cases in which this Court has reviewed an interlocutory order involved questions as to the jurisdiction of a federal district court. *E.g.*, *Gulf Oil Corp.* v. *Copp Paving Corp*, 419 U.S. 186, 192-93 (1974); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938); *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949). Other such cases have involved clear-cut and equally dispositive legal questions. *E.g.*, *Firefighters' Local No. 1784* v. *Stotts*, 467 U.S. 561 (1984) (district court's authority to modify consent decree or to invoke decree as authority for injunction). *Estelle* v. *Gamble*, 429 U.S. 97, 115 (1976), *cert. denied*, 434 U.S. 974 (1977) (reinstating district court's dismissal of civil rights claim based upon negligence of prison physicians); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723,

727 (1975) (dispositive securities-law issue); *United States* v. *Nixon*, 418 U.S. 683, 690-92 (1974) (potentially dispositive claim of executive privilege); *United States* v. *General Motors*, 323 U.S. 373, 377 (1945) (potentially dispositive damages issue after damages trial); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403 (1916) (reviewing trademark claim underlying temporary injunction); *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) (reviewing merits of lower court decision dismissing action to restrain collection of tax); *American Construction Co.* 148 U.S. at 382 (petitioner's position, if sustained, would render decision below "wholly void"). Still others arose in circumstances such that a refusal to grant interlocutory review would render the case moot. *E.g.*, *E.I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917) (reinstating preliminary injunction enjoining disclosure of trade secrets). Finally, this Court has granted review of a number of interlocutory court of appeals decisions reversing or vacating final district court judgments. *E.g.*, *Spiller* v. *Atchison, T. & S.F. R. Co.*, 253 U.S. 117, 121-22 (1920) (final district court decision adjudicating liability under agency's reparation order); *Gay* v. *Ruff*, 292 U.S. 25, 27 (1934) (final district court decision dismissing for want of prosecution).

But, regardless of the circumstances, in every case (of which respondents are aware) in which this Court has granted review of an interlocutory order, the issue presented was an issue as to which a decision in favor of at least one of the parties would, as a legal or practical matter, cut off further litigation with respect to that particular subject matter.[7] And, except for cases involv-

[7] Even in cases in which a particular order has been deemed final under the "collateral order" doctrine, the issue presented is always at least potentially dispositive of the collateral matter at issue. See, *e.g.*, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (availability of security pending disposition of shareholder directive action); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-58 (1964) (potentially dispositive question of liability as

ing the jurisdiction of the courts of appeals over interlocutory district court orders (and in which the issue presented therefore could not be addressed in a later proceeding),[8] *every* such case has presented an issue that was potentially dispositive of the entire litigation.

That clearly is not true in this case. The question presented concerns the district court's authority to impose *one* of the remedies sought by the petitioner below, not the court's jurisdiction over—or the merits of—petitioner's antitrust claims. See Pet. App. A20 (remanding for consideration of other remedies). Nor is the issue otherwise dispositive of the subject matter—*i.e.*, the relief to which petitioner is entitled—much less the entire litigation: Whether this Court decides the divestiture issue

to claims of some plaintiffs); *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (availability of injunction barring public parade); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (potentially dispositive claim of executive immunity from suit); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) (availability of jury trial); *Greene* v. *United States*, 376 U.S. 149, 153 n. 5 (1964) (propriety of lower court's exhaustion requirement). This case, however, clearly does not fit within the collateral order doctrine because, as discussed in the text (*infra* p. 12), the court of appeals' ruling as to the availability of divestiture is not "effectively unreviewable on appeal from a final judgment." *Flanagan* v. *United States*, 465 U.S. 259 (1984) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

[8] *E.g.*, *DiBella* v. *United States*, 369 U.S. 121, 122-23 (1962) (appealability of district court decision on preindictment motion to suppress evidence); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (appealability of district court decision on pretrial motion to disqualify counsel); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (appealability of pretrial motion claiming prosecutorial vindictiveness). Although (unlike the other cases discussed in the text), the jurisdictional issues in those cases have not been potentially dispositive of the entire litigation, they have, of course, been dispositive of the litigation in the court of appeals. In addition, and unlike the situation presented in this case (see *infra* p. 12), refusal to grant review at an interlocutory stage in those cases would have meant that the jurisdictional issues presented would never be addressed by this Court.

in favor of petitioner or respondents, the parties will have to return to the district court for a trial on the merits of petitioner's antitrust claims and a final determination of the appropriate remedy. Moreover, if petitioner prevails on the merits, it will be able to present the divestiture issue in a new petition for certiorari, since it is well established that this Court may reach back and decide "all of the substantial federal questions determined in the earlier stages of the litigation." *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)); see also *Scott* v. *United States*, 436 U.S. 128 (1978) (same); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257 (same); *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941) (same). Granting the petition at this stage of the litigation, therefore, would be an unprecedented step as well as an unnecessary expenditure of this Court's resources.

Second, in any event, it is obvious that resolution of the issue presented is not in any sense "necessary" or "fundamental" to the further conduct of the case. See *American Construction Co. supra*, 148 U.S. at 381; *United States* v. *General Motors*, *supra*, 323 U.S. at 377. If, after a full trial, the district court determines that American's acquisition of Lucky, as modified by the consent order issued by the FTC, does not violate Section 7 of the Clayton Act, the availability of divestiture will be irrelevant.[9] The same will be true if the district court concludes, after a full trial on the issue, that divestiture is not the appropriate remedy. As the petitioner conceded before the court below:

> Whether or not the *IT&T* ruling is controlling in this case is a separate question, which may or may not have to be reached, depending upon the availability, following a trial, of other effective forms of relief. Supp. Brief of Plaintiff-Appellee at 15.

[9] Moreover, the decision of the court of appeals below casts substantial doubt on the district court's analysis of the merits, particularly with respect to market share and barriers to entry. See Pet. App. A10, A13.

Petitioner's doubts about its ability to obtain a permament divestiture order after trial are well founded, for courts generally will order such a drastic remedy only when other relief is inadequate. *E.g.*, *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962); *Credit Bureau Report, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780, 798 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *United States* v. *Reed Roller Bit Co.*, 274 F. Supp. 573 (W.D. Okla. 1967). Moreover, petitioner's claims that the district court will be unable to provide an adequate remedy without employing divestiture are wholly speculative: It is not at all clear that narrowly tailored prohibitions against particular activities by the merged entities will be inadequate to eliminate any adverse competitive effects the district court might identify at trial.

If, however, petitioner prevails on the merits below and still believes that divestiture is the only adequate remedy, there is nothing to prevent petitioner from raising the divestiture issue in a subsequent petition for certiorari. See *supra*, p. 12. For that reason, resolution at this time of the issue presented is by no means "necessary" to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.*, *supra*, 148 U.S. at 384.

b. Apparently recognizing this fundamental difficulty, petitioner argues that immediate review is nonetheless essential because of the district court's alleged "finding" that an integration of the Alpha Beta and Lucky supermarket chains would cause irreparable harm by "disabling" one of those chains from operating independently in the future. Pet. 19. This argument is misguided for three reasons.

First, assuming the petitioner's argument is factually correct, it is legally irrelevant. Petitioner does not argue

that an integration of Lucky and Alpha Beta will moot the divestiture issue by making it impossible for the district court to order that relief if this Court (after a second petition for certiorari) ultimately decides the issue in petitioner's favor. Much less does petitioner claim what would be necessary for this case to fall within this Court's precedents, namely, that such an integration will moot the entire case. See *supra* p 10. Rather, petitioner's contention appears to be that a permanent divestiture issued without the benefit of a preliminary divestiture would be somehow less "effective" (Pet. 19). But that allegation, even if true, does not establish that a decision on the question presented in the petition could dispose of the litigation or of the question as to the ultimate propriety of a divestiture remedy.

Nor can petitioner's alleged harm properly be characterized as "extraordinary," as required by *American Construction* and its progeny. Finality requirements frequently impose substantial burdens on litigants: An antitrust plaintiff alleging an ongoing pattern of predatory pricing, for example, might be forced out of business as a result of a district court's erroneous order refusing to grant summary judgment prior to a lengthy trial. But that harm is not deemed sufficiently "extraordinary" to permit immediate review of a denial of summary judgment. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976). *A fortiori*, there is nothing extraordinary about the diminution in the "effectiveness" of the ultimate relief that petitioner claims will result from a denial of its petition. In short, petitioner's litigant-specific concern is no reason for this Court to depart from its usual practice of denying review of interlocutory orders.

Second, petitioner's argument rests upon a mischaracterization of the district court's opinion. Contrary to petitioner's assertion, the district court nowhere made a finding that integration of the two grocery chains would

"disable" one of them from subsequent independent operation; the passage quoted by petitioner (Pet. 19) appears in the district court's summary of the *petitioner's* contentions (see Pet. B22), not in the court's preliminary factual findings. As the court of appeals observed, "[t]he district court decided that the irreparable harm that would result absent an injunction is the lessening of competition'" (Pet. App. A16) not any "disabling" of one of the two grocery chains.[10]

Third, petitioner's argument ignores the many cases in which divestiture has been ordered long after full integration of the merging firms. One such case is particularly analogous: In *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), this Court required divestiture of a major California grocery chain years after the merger had been consummated and the assets, management teams and businesses of the merging chains had been intermingled. See also, *e.g.*, *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (ordering divestiture); *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968) (reversing and remanding to district court to reconsider government's divestiture request). Obviously, the fact that merging firms have already been integrated in no way deprives the district court of authority to order divestiture if it can make the necessary findings supported by the record.

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[10] Petitioner also attempts to assert this alleged "lessening of competition" as an independent reason for ignoring the interlocutory nature of the order under review. See Pet. 22 ("Even between the time this case is remanded to the District Court and actually tried, substantial irreparable harm is likely to be inflicted on California's consumers"). Like the alleged injury discussed in the text, however, this injury (if it exists) is certainly not "extraordinary" (since it is no different from the injury generally sustained by a plaintiff during the pendency of a meritorious antitrust case), and it does not make the issue presented potentially dispositive of the litigation.

In sum, petitioner has presented no adequate reason for ignoring this Court's usual practice of denying petitions for review of interlocutory orders. The petition should be denied for that reason alone.

2. The only issue raised in the petition is whether divestiture is an available *post*-merger remedy under Section 16 of the Clayton Act. See *supra* n. 6. Regardless of any disagreement among the lower courts on that issue, it is not of sufficient practical importance to warrant review by this Court because (1) the well-recognized right of any plaintiff to obtain a *pre*-merger injunction, together with (2) the pre-merger notification requirements of the Hart-Scott-Rodino Act, has made post-merger divestiture a virtual dinosaur.

It is well established—and petitioner does not dispute —that *any* plaintiff can seek to enjoin a merger or acquisition *before* it has been consummated. The federal government, which by statute has principal responsibility for enforcing the antitrust laws, can do so under Section 15 of the Clayton Act. 15 U.S.C. § 25. Other plaintiffs, including the States, can do so under Section 16. 15 U.S.C. § 26. Non-federal plaintiffs, moreover, frequently succeed in blocking mergers and acquisitions before they occur. *E.g., Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), *cert. dismissed*, 469 U.S. 1200 (1985); *Grumman Corp.* v. *LTV Corp.*, 665 F.2d 10 (2d Cir. 1981); *Gulf & Western Industries* v. *Great A&P Tea Co.*, 476 F.2d 687 (2d Cir. 1973; *American Crystal Sugar Co.* v *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *Muskegon Piston Ring Co.* v. *Gulf & Western Industries*, 328 F.2d 830 (6th Cir. 1964); *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D.Mich. 1960), *aff'd per curiam*, 280 F.2d 747 (6th Cir. 1960).

Moreover, the pre-merger notification procedures of the Hart-Scott-Rodino Act ("HSR Act") (15 U.S.C. § 18a) provide both federal enforcement authorities and private plaintiffs ample time to challenge a merger or acquisition before it has become a *fait accompli;* indeed, that was one of the HSR Act's primary purposes. See, *e.g.*, S. Rep. No. 803, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2637; S. Axinn, B. Fogg, N. Stoll, & B. Pragen, *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act* 1-5 (1988). The Act and regulations promulgated thereunder (16 C.F.R. § 801 *et seq.*)—which apply to virtually all mergers of any consequence (see 15 U.S.C. § 18a(a)) —require that parties to a merger or acquisition wait a minimum of 30 days (15 days in the case of a cash tender offer) after they notify the FTC of their intention to merge with, acquire or be acquired by another company. 15 U.S.C. § 18a(b). Issuance of a request for additional information, moreover, will delay expiration of the waiting period for an additional 20 days (10 days in the case of a cash tender offer). *Id.* In addition (and more important for purposes of this case), negotiations with federal authorities often prolong that period by several weeks. Indeed, in this case, the petitioner had a total of 79 days from the beginning of the waiting period to the completion of the merger.

Particularly in light of the business exigencies frequently associated with mergers and acquisitions (including fast-paced hostile tender offers, competing bids and wildly fluctuating stock prices), the HSR procedures provide ample time for anyone with a serious interest in the competitive effects of a particular merger or acquisition to compile the evidence needed to seek a temporary restraining order and a preliminary injunction.[11] Indeed,

[11] As illustrated by the present case, moreover, other parties may participate to some degree in the federal government's deliberations, and may thereby obtain important evidence concerning the merger from the federal government.

private plaintiffs routinely sue to enjoin mergers while the HSR periods are running. *E.g.*, *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir. 1988), *cert. denied*, 108 S.Ct. 1996 (1988); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co., supra; R.C. Bigelow, Inc.* v. *Unilever N.V.*, 689 F. Supp. 76 (D. Conn. 1988); *McCaw Personal Communications, Inc.* v. *Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986). In short, the HSR pre-merger notification procedures have rendered post-merger injunctions unnecessary and obsolete.

As this case illustrates, the only situation in which the issue presented in the petition can arise is the rare situation in which (a) all other interested parties—including federal enforcement authorities reviewing the transaction under the HSR procedures—have determined not to challenge the transaction, and (b) a non-federal plaintiff has failed to challenge the transaction before it is completed, but later chooses to file suit. That, of course, is exactly what happened here. The FTC approved the merger after the parties agreed to divest a number of their stores, including many in California. However, the CAG, which, in the court of appeals' words, "could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed," nonetheless "chose not to do so." Pet. App. A20-21.[12]

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[12] In an effort to avoid the force of the Ninth Circuit's holding on this point, petitioner mistakenly relies upon the district court's statement that petitioner conducted its *investigation* of the instant merger "as swiftly as was responsibly possible." Pet. 15. The district court, however, made no reference to the filing of the CAG's lawsuit and request for a preliminary injunction, which the Ninth Circuit obviously believed to be tardy. Indeed, given that the Ninth Circuit's non-divestiture rule has been clearly established for almost fifteen years, the CAG's failure to initiate a lawsuit and seek a preliminary injunction during the 79 days between the commencement of its investigation and the consummation of the merger was wholly unjustified.

Contrary to the CAG's assertions (Pet. 16), moreover, initiation of its own lawsuit would not have required the CAG to "disregard" the FTC's review procedures. The CAG could easily have pursued both avenues simultaneously.

Thus, as long as a non-federal plaintiff exercises reasonable diligence in challenging a merger or acquisition it believes to be unlawful, the issue presented in the petition will never arise. There is no reason to believe that petitioner—or any other non-federal party—will fail to exercise such diligence in the future, particularly where, as in the Ninth Circuit, the law is clear that divestiture will not be available as a post-merger remedy. The limited tension between the holdings of the First and the Ninth Circuits,[13] therefore, is simply not of sufficient import to require resolution by this Court.

3. In any event, the Ninth Circuit's long-standing interpretation of Section 16 is demonstrably correct. Section 15 of the Clayton Act (15 U.S.C. § 25) grants *federal* enforcement authorities general authority to commence any "proceeding in equity" to remedy a violation of the antitrust laws, and it is well established that this provision authorizes the United States to sue for divestiture. *E.g.*, *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961). Section 16, however, is narrower in scope, authorizing non-federal plaintiffs to sue only for "injunctive relief." 15 U.S.C. § 26.

As the Ninth Circuit correctly held in *IT&T* and subsequent decisions (including the decision below), "injunctive relief" under Section 16 is by no means synonymous

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[13] The First Circuit's decision in *CIA Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), is the only circuit court decision arguably in conflict with the Ninth Circuit's long-standing no-divestiture rule. The Third Circuit's discussion of the divestiture issue in *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975), *rev'd on other grounds*, 429 U.S. 477 (1976), was mere dictum.

with "equitable relief" under Section 15. It is well established in equity jurisprudence—both now and in 1914, when the Clayton Act was passed—that "injunctive relief" is a particular species of equitable relief, separate and distinct from other, well-established equitable remedies such as dissolution or divestiture. *E.g.*, 1 J. Story, *Commentaries on Equity Jurisprudence* 680-82 (13th ed. 1886) (treating dissolution as distinct equitable remedy); J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1316 & n. 7 (1905) (analyzing injunction as distinct category of equitable relief, separate from such equitable remedies as dissolution, receivership, reformation, specific performance, etc.); *Graves* v. *Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924) (L. Hand, J.) (treating injunction and dissolution as distinct equitable remedies). Moreover, the legislative history of Section 16 makes clear Congress's understanding in 1914 that, unlike the Federal Government, non-federal plaintiffs would not be able to seek divestiture under the statute precisely because such a remedy was not considered "injunctive relief." See, *e.g.*, *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63rd Cong., 2d Sess. (1914) ("1914 Hearings") at 842 (statement of committee member that "[w]e did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has") (1914), *quoted in IT&T*, 518 F.2d at 922; see also 1914 Hearings at 261, 491-92, 649-50, 842-45, 1372-73 (1914).[14] Given the language, structure and legislative history of Section 16, there is no warrant for petitioner's view that "injunctive relief" should now be construed to include any kind of equitable relief a resourceful antitrust plaintiff might imagine.

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[14] In addition, the legislative history of the Hart-Scott-Rodino Act clearly indicates Congress's understanding that state attorneys general do not have authority to seek divestiture under Section 16. See 122 Cong. Rec. 30,868 (1976) (statement of Rep. Peter Rodino).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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